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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALBERT GRADILLES YSLAS, Appellant.	)	2 CA-CR 2009-0199 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081769

Honorable Howard Hantman, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Albert Yslas was convicted of aggravated driving under the influence of an intoxicant (DUI) while his license was revoked, aggravated driving with a blood alcohol concentration (BAC) of .08 or more while his license was revoked, and two additional counts of aggravated DUI with two or more prior DUI convictions. The trial court sentenced him to concurrent, substantially mitigated, six-year terms of imprisonment on each count. On appeal, Yslas argues the court abused its discretion when it denied his motion for mistrial and his motion to suppress evidence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions, and we resolve all reasonable inferences against the defendant. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). Late one morning in October 2007, a Pima County sheriff's deputy, Dan De Jong, saw a white pickup truck proceed past a stop sign without stopping. He activated his emergency lights, and "the vehicle initially did not stop." While following the truck, De Jong observed it momentarily swerve onto the dirt shoulder of the road and then travel through another intersection before turning onto a side road and stopping. While speaking with the driver, who was later identified as Yslas, De Jong "smelled an odor of intoxicants." Suspecting Yslas was under the influence of alcohol, De Jong asked him to perform two field sobriety tests and submit to a horizontal gaze nystagmus (HGN) test. Based on the results of those tests, De Jong arrested Yslas and took him to the nearest sheriff's office for a blood test. The results revealed Yslas's BAC was .198.

Denial of Mistrial

¶3 Yslas argues the trial court erred in denying his motion for mistrial. Specifically, he contends the state violated a court order when Annie Garigan, custodian of records for the Arizona Department of Transportation's Motor Vehicle Division (MVD), testified Yslas's license had been revoked after he previously had committed the offense of aggravated DUI.

¶4 We review a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Williams*, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004). We recognize "the declaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, ¶ 131, 141 P.3d 368, 399 (2006). When such error occurs, we will not reverse a conviction if the error is clearly harmless. *State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). In determining whether the trial court abused its discretion, we consider two factors: "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶5 The state does not dispute that it violated the terms of its agreement with defense counsel when its witness testified that Yslas had a previous conviction for aggravated DUI. It acknowledges it had entered into an agreement with Yslas's counsel on the first day of trial not to refer to Yslas's prior DUI convictions as aggravated DUIs or as felonies during the state's case-in-chief. The state also agreed that it would

"sanitize" any records to conform to the agreement. Nonetheless, the MVD custodian of records testified that Yslas had two prior DUI convictions, one of which was an aggravated DUI. Yslas moved for a mistrial, arguing he was prejudiced by the jury's having heard that one of his prior DUI convictions was for aggravated DUI. The trial court denied the motion.

¶6 Although the state emphasizes that it violated no written order, the parties' agreement was enforceable as a stipulation. *See Harsh Bldg. Co. v. Bialac*, 22 Ariz. App. 591, 593, 529 P.2d 1185, 1187 (1975), *quoting Bekins Van & Storage Co. v. Indus. Comm'n*, 4 Ariz. App. 569, 570, 422 P.2d 400, 401 (1967) ("'A stipulation is an agreement, admission or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect to some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble and expense.'"). Therefore, although there is no written order implementing the agreement, it was, as the trial court implicitly acknowledged in criticizing the prosecutor's failure to limit Garigan's testimony, binding on the parties. *See Pulliam v. Pulliam*, 139 Ariz. 343, 345, 678 P.2d 528, 530 (App. 1984) (holding "parties are bound by their stipulation unless relieved therefrom by the court"); *see also State v. Thorne*, 193 Ariz. 137, 138, 971 P.2d 184, 185 (App. 1997) (state bound by pre-trial stipulation). Moreover, to secure a conviction for aggravated DUI in the instant case, the state was required only to demonstrate that Yslas previously had been convicted of two or more DUIs within the preceding eighty-four months. *See* A.R.S. § 28-

1381(A)(1), (2); A.R.S. § 28-1383(A)(2).[1] Whether any of those prior offenses was aggravated was not relevant to any issue before the jury. *See* Ariz. R. Evid. 401. In short, the testimony was inadmissible and improper, regardless of the state's agreement not to refer to the aggravated nature of one of the prior convictions.

¶7 Nonetheless, the trial court did not abuse its discretion in concluding that the improper testimony had too little prejudicial impact in the context of the case as a whole to warrant the "most dramatic remedy for a trial error." *Roque*, 213 Ariz. 193, ¶ 131, 141 P.3d at 399; *see State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000) (trial court "in the best position to determine whether the evidence will actually affect the outcome of the trial"). Here, the court reasonably could have concluded that Garigan's single use of the word "aggravated" to describe one of Yslas's convictions was not sufficiently prejudicial to affect the outcome of the trial. Even assuming the jury could deduce that Yslas's prior conviction for an aggravated DUI meant that he previously had been adjudicated a repeat DUI offender, such an inference readily was apparent from the properly admitted evidence that he previously had been convicted of other DUIs. Thus, we are skeptical that the improperly admitted evidence had any significant prejudicial effect beyond that already inherent in the properly admitted testimony before the jury.

¶8 The likelihood that Garigan's testimony affected the outcome of the trial was reduced further by the trial court's curative instructions. Specifically, the jury was

[1]The versions of the statutes in effect when Yslas committed the offenses are found at 2007 Ariz. Sess. Laws, ch. 219, § 1 (former § 28-1381), and 2007 Ariz. Sess. Laws, ch. 159, § 1 (former § 28-1383). They are the same in relevant part as the versions currently in effect.

instructed that the prior DUI offenses "may only be considered . . . for the purposes of deciding whether the State has proved to you beyond a reasonable doubt that there were two prior DUI convictions within [eighty-four] months preceding this offense." It was also instructed that evidence of Yslas's prior DUI convictions "is not to be used by you to prove the character of the defendant or show that he committed the offenses charged." We presume the jury followed those instructions. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007).

¶9 Finally, the state presented substantial evidence of Yslas's guilt. Its witnesses testified Yslas had been driving erratically, he smelled of intoxicants, he performed poorly on two nonstandardized field sobriety tests, the HGN test indicated all six cues of neurological impairment, and a test of his blood revealed a BAC of .198. The trial court did not abuse its discretion in denying the motion for mistrial.

Motion to Suppress

¶10 Yslas argues the trial court erred when it denied his motion to suppress evidence based on an unreasonable search and seizure. This court reviews a trial court's ruling on a motion to suppress for an abuse of discretion. *State v. Szpryka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). An abuse of discretion includes an error of law. *State v. Campoy*, 220 Ariz. 539, ¶ 37, 207 P.3d 792, 804 (App. 2009). When reviewing a court's ruling on a motion to suppress, we consider only evidence presented at the suppression hearing and view that evidence in the light most favorable to sustaining the court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶11 Yslas contends the state conducted an unreasonable search of his person in violation of his Fourth Amendment rights when an officer drew his blood at the sheriff's office rather than having medical personnel do so in a medical facility. In particular, he contends his blood was drawn in violation of the standards set forth in *Schmerber v. California*, 384 U.S. 757 (1966). There, the United States Supreme Court held that it was reasonable for a "physician [to take a blood sample] in a hospital environment according to accepted medical practices." *Id*. at 771. In so doing, however, the Court emphasized:

> We are . . . not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Id. at 771-72. Thus, although the above statements are dicta, addressing only hypothetical scenarios then not before the Court, its language at minimum suggests that the very actions taken here raise serious constitutional questions. *See Performance Funding, L.L.C. v. Barcon Corp.*, 181 Ariz. 286, ¶ 8, 3 P.3d 1206, 1208 (App. 2000) ("[A]s dictum, the supreme court's language is not controlling.").

¶12 This court, however, has twice addressed those serious questions and has held, in conformity with decisions in other states, that law enforcement officers trained in phlebotomy may draw blood in other than medical environments without running afoul of the Fourth Amendment. *State v. Noceo*, 223 Ariz. 222, ¶¶ 4, 7-8, 221 P.3d 1036, 1038-39 (App. 2009); *State v. May*, 210 Ariz. 452, ¶¶ 3, 6-8, 112 P.3d 39, 40, 41-42 (App. 2005).

And, in those cases, officers had conducted blood draws under circumstances deviating considerably more from accepted medical practices than that conducted here in the well-lit, stable environment of the sheriff's office. *See Noceo*, 223 Ariz. 222, ¶¶ 4, 7-8, 221 P.3d at 1038-39 (finding no constitutional infirmity in blood draw under poor lighting conditions in back of police car when defendant fell asleep during draw); *May*, 210 Ariz. 452, ¶¶ 6-10, 112 P.3d at 41-42 (blood draw constitutionally reasonable search although conducted in violation of medical standard of care with defendant standing and resting arm on car trunk).

¶13 It is arguable that, in these cases, our court has taken a considerably more tolerant approach to the constitutionality of physically intrusive evidence-gathering by police officers than that expressed by the Court in *Schmerber*. *See* 384 U.S. at 772 ("The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States[']minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."). But, we are bound to follow the prior opinions of this court unless there are compelling reasons to reject them. *See Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974) ("[T]he principle of Stare decisis and the need for stability in the law in order to have an eff[i]cient and effective functioning of our judicial machinery dictate that we consider decisions of coordinate courts as highly persuasive and binding."); *see also State v. Hickman*, 205 Ariz. 192, ¶¶ 37-38, 68 P.3d 418, 426-27 (2003) (departure from precedent demands compelling reasons). And were we inclined to reconsider the approach taken by

this court's opinions in *May* and *Noceo*, we would not do so here, where Yslas has offered no expert testimony suggesting the state deviated in any respect from appropriate medical standards when an officer, trained in phlebotomy, drew Yslas's blood while he was seated appropriately in the controlled and well-lit environment of the sheriff's office.

¶14 Yslas's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge